

BEFORE THE
CALIFORNIA BOARD OF OCCUPATIONAL THERAPY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JAIME HUMBERTO GALAVIZ
Menlo Park, California

Occupational Therapy Assistant License
No. OTA 1799,

Respondent.

Case No. OT 2008-107

OAH No. 2010031011

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Occupational Therapy, State of California, as its Decision in the above-entitled matter.

This Decision shall become effective on December 9, 2010.

IT IS SO ORDERED November 9, 2010

Mary McGeer, OTR/L, MBA

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PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on August 9, 2010.

Deputy Attorney General Jonathan D. Cooper represented complainant Heather Martin, Executive Officer of the California Board of Occupational Therapy, Department of Consumer Affairs, State of California.

Respondent Jaime Humberto Galaviz was present and self-represented.

The record was left open for respondent to submit additional evidence, and for complainant to submit written comment on the evidence. Respondent timely submitted the following documents: a letter from him dated August 22, 2010, with an attached Summary of Service regarding Employee Assistance Plan benefits (marked as Exhibit A); an Assignment to San Mateo County Driving Under the Influence Program (marked as Exhibit B); a Notice of Completion Certificate dated September 8, 2009 (marked as Exhibit C); and a letter dated August 13, 2010, from Kay Kitauchi, Consonus Health Services (marked as Exhibit D). On August 24, 2010, counsel for complainant submitted a letter indicating he had no objection to the documents, and no additional evidence to offer (marked as Exhibit 17). Respondent's exhibits A through D are admitted in evidence. The record was closed and the matter was submitted for decision on August 24, 2010.

FACTUAL FINDINGS

1. On June 30, 2008, the California board of Occupational Therapy issued occupational therapy assistant license number OTA 1799 to respondent Jaime Humberto Galaviz. The license is in full force and effect, and is current to December 31, 2010.

2. An occupational therapy assistant is one who is qualified to assist in the practice of occupational therapy under the supervision of a licensed occupational therapist. (Bus. & Prof. Code, § 2570.2, subd. (h).)

DUI Conviction Subsequent to Licensure

3. On January 20, 2009, respondent was convicted in the Superior Court of California, County of San Mateo County, on his plea of nolo contendere, of a misdemeanor violation of Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more), and his admission that his blood alcohol level was 0.15 percent or greater (Veh. Code, § 23578).

Imposition of sentence was suspended, and respondent was placed on court probation for three years. Terms and conditions of probation included 96 hours in county jail (to be served through the Sheriff's work program), fines and assessments of \$1,651, and a six-month drinking-driver program.

4. The offense took place on October 26, 2008. Respondent drove his vehicle from San Francisco to San Mateo after drinking a sufficient amount of alcohol at a party that his blood alcohol level was 0.18 percent. Respondent was stopped by a police officer at 4:00 a.m., after driving erratically and crossing the dividing lines on Highway 101 north of the Hillsdale Drive exit in San Mateo. Respondent had a passenger in his vehicle. Respondent failed all field sobriety tests given him.

5. The offense, as committed by respondent, is substantially related to the qualifications, functions, or duties of an occupational therapy assistant because it demonstrates a potential unfitness to perform the duties of the licensed activities in a manner consistent with the public health, safety, or welfare.

6. In committing the offense, respondent used alcohol in a manner which was dangerous to himself, the passenger in his vehicle, those driving on the road, and the public.

Pre Licensure DUI Conviction and Notice of Warning

7. On October 13, 1992, respondent was convicted in Fresno County Superior Court of a felony violation of Vehicle Code sections 23552, subdivision (a)/23175 (driving under the influence of alcohol with three or more prior convictions of driving under the influence of alcohol within seven years). (The prior DUI convictions occurred in 1986, 1987, and 1991.)

8. Prior to his licensure in California, respondent received from the board a Notice of Warning dated June 2, 2008. In this notice, respondent was advised:

The California Board of Occupational Therapy has closed its investigation into your conviction history that you disclosed on your Occupational Therapy Assistant Application.

[¶] ... [¶]

The board notes that you were convicted for driving under the influence on four separate occasions with the most recent conviction in September 1992. Sanctions imposed by the court include completion of an educational/rehabilitation program designed to prevent any reoccurrence of similar conduct.

In issuing this Notice of Warning, please be advised that should the board receive a future substantiated report that you have committed a similar violation, action to suspend or revoke your license may be initiated at that time.

Respondent's Evidence

9. Respondent has completed the six-month DUI program required by his probation. He remains on criminal probation until January 2012.

10. Respondent successfully completed a five-year probationary term for his 1992 offense in 1997. In 2008, the offense was reduced to a misdemeanor and the conviction was set aside pursuant to Penal Code section 1203.4.

11. Respondent has been employed as an occupational therapy assistant by Consonus Healthcare Services at their Lytton Gardens Senior Community in Palo Alto since July 2008. Respondent submitted three letters of support from his supervisors and a co-worker.

Kay Kitauchi, OTR/L, is the Director of Rehab for Consonus Health Care Services, and has been respondent's direct supervisor since July 2008. In a letter dated August 13, 2010, she attests that respondent is professional and composed. She is aware of respondent's 2009 DUI, but she has not seen it affect the quality of his work at Lytton Gardens.

Tricia Burk, OTR/L, supervised respondent for two years at Lytton Gardens. In a letter dated April 7, 2010, she attests:

I am aware of the situation that has brought Jaime to ask me to write this letter. Given all that he has done for me (as one of his supervising OTs) and for the patients here at Lytton Gardens, I

gladly accepted. Nothing from the DUI incident has reflected in Jaime's work ethic. At work he is friendly, reliable and hardworking. I always observe him to treat his clients with kindness and respect.

Erin Conn, DPT, is a physical therapist who has worked with respondent for a year and one-half. In a letter dated June 14, 2010, she attests that he is "an outstanding therapy assistant," who is a valued, respected, and professional rehabilitation team member.

12. Respondent admits that he made a "bad decision" to drink and drive in October 2008. He attributes his conduct to depression stemming from ending a 14-year relationship and losing his home in Texas. He attended a session with a general counselor through his Employee Assistance Program, which he found useful to help him from keeping from drinking and driving.

13. Respondent does not believe that he has a problem with alcohol. He calls his 2009 DUI a "slip up," which he has addressed with his EAP counselor. He has tried 12-step meetings but does not find them useful.

14. Respondent testified that he has been licensed as an occupational therapist assistant for eleven years. He loves his work and hopes to maintain his licensure in California.

Costs

15. The actual costs of investigation and prosecution in this matter were \$1,367.50. This represents \$390 in paralegal time, and \$977.50 in Deputy Attorney General time. These costs are found to be reasonable. Respondent does not argue, otherwise.

License Discipline

16. Complainant does not recommend license revocation, but does recommend that respondent be placed on probation to the board with standard terms and conditions and requirements that he abstain from the use of alcohol and controlled substances, undergo random testing, and attend a chemical dependency support group.

17. Respondent agrees that his license should be disciplined, and he is agreeable to being on probation to the board, but stresses that his issues with driving under the influence of alcohol have never affected his work.

18. It is noted that respondent was not able to provide the board with a letter from his EAP therapist regarding his use of alcohol, as that therapist is not an alcohol or drug counselor.

LEGAL CONCLUSIONS

1. The standard of proof in an administrative action seeking to suspend or revoke a professional license is clear and convincing evidence to a reasonable certainty. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

First Cause for Discipline

2. Pursuant to Business and Professions Code section 2570.28, subdivision (e), the board may discipline a licensee for unprofessional conduct, which is defined to include the conviction of an offense that is substantially related to the qualifications, functions or duties of the licensee. Cause for license discipline exists in that respondent has been convicted of a crime which bears a substantial relationship to the qualifications, functions or duties of an occupational therapy assistant, as set forth in Findings 3 to 5.

Second Cause for Discipline

3. Pursuant to Business and Professions Code sections 2570.28, subdivision (a), and 2570.29, subdivision (c), the board may discipline a licensee who has been convicted of a criminal offense that involves the self-administration of alcohol. Cause for license discipline exists in that respondent has been convicted of a criminal offense involving the consumption of alcohol, as set forth in Findings 3 and 4.

Third Cause for Discipline

4. Pursuant to Business and Professions Code section 2570.29, subdivision (b), the board may discipline a licensee who has used alcohol in a manner dangerous or injurious to himself, to any other person, or to the public, or that impaired his ability to conduct with safety the practice authorized by his licensure. Cause for license discipline exists in that respondent has used alcohol in a manner dangerous to himself, to another person, and the public, as set forth in Findings 3, 4, and 6.

Costs

5. Business and Professions Code section 125.3 provides that a respondent may be ordered to pay the board "a sum not to exceed the reasonable costs of the investigation and enforcement of the case." The reasonable costs of investigation and enforcement are determined to be \$1,367.50, as set forth in Finding 15. Respondent shall be ordered to pay this sum to the board.

Level of Discipline

6. The purpose of administrative discipline is not to punish but to protect the public. (*Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817.) And in

determining the appropriate penalty, public safety is the board's paramount concern. (Bus. & Prof. Code. § 2570.25.)

The board has developed disciplinary guidelines, which are incorporated by reference in California Code of Regulations, title 16, section 4144. The board has also developed criteria of rehabilitation which are set forth in the guidelines. The disciplinary guidelines have been considered in making the determination that it is appropriate to place respondent on probation to the board, with conditions that address his apparent problem with alcohol.

Respondent exercised extremely poor judgment when he decided to drink and drive a fifth time. While respondent believes he has successfully addressed the problem by meeting with an EAP counselor, that counselor is not qualified to address respondent's alcohol problem. Respondent has a long history of drinking and driving, which has become a pattern that the board cannot ignore. It is to respondent's credit that there is no evidence that he has ever performed less than professionally as an occupational therapy assistant. Nevertheless, his pattern of DUI's raises serious questions about his fitness for licensure, and warrants a period of supervised probation.

ORDER

Occupational Therapist Assistant License No. OTA 1799, issued to respondent Jaime Humberto Galaviz, is revoked. However, the revocation is stayed, and respondent is placed on probation for three (3) years upon the following terms and conditions.

1. Obey All Laws - Respondent shall obey all federal, state and local laws and regulations governing the practice of occupational therapy in California. Respondent shall submit, in writing, a full detailed account of any and all violations of the law to the board within five (5) days of occurrence.
2. Compliance with Probation and Quarterly Reporting - Respondent shall fully comply with the terms and conditions of probation established by the board and shall cooperate with representatives of the board in its monitoring and investigation of Respondent's compliance with probation.

Respondent, within 10 days of completion of the quarter, shall submit quarterly written reports to the board on a Quarterly Report of Compliance form obtained from the board.

3. Personal Appearances - Upon reasonable notice by the board, respondent shall report to and make personal appearances at times and locations as the board may direct.
4. Notification of Address and Telephone Number Change(s) - Respondent shall notify the board, in writing, within five (5) days, of a change of residence or

mailing address, of his new address and any change in work and/or home telephone numbers.

5. Tolling for Out-of-State Practice, Residence or In-State Non-Practice - In the event respondent should leave California to reside or to practice outside the State for more than thirty (30) days, respondent shall notify the board or its designee, in writing, within ten(10) days, of the dates of departure and return. All provisions of probation other than the quarterly report requirements, examination requirements, and education requirements, shall be held in abeyance until respondent resumes practice in California. All provisions of probation shall recommence on the effective date of resumption of practice in California.
6. Notification to Employer(s) - When currently employed or applying for employment in any capacity in any health care profession, respondent shall notify his employer of the probationary status of his license. This notification to the current employer shall occur no later than the effective date of this Decision. Respondent shall notify any prospective health care employer of his probationary status with the board prior to accepting such employment. This notification shall be made by providing the employer or prospective employer with a copy of the board's Accusation and Disciplinary Decision.

Respondent shall cause each health care employer to submit quarterly reports to the board. The report shall be on a form provided by the board, and shall include a performance evaluation and such other information as may be required by the board.

Respondent shall notify the board, in writing, within five (5) days of any change in employment status. Respondent shall notify the board, in writing, within five (5) days, if he is terminated from any occupational therapy or health care related employment, with a full explanation of the circumstances surrounding the termination.

7. Employment Requirements and Limitations - During Probation, respondent shall work in his licensed capacity in the State of California. This practice shall consist of no less than six (6) continuous months and of no less than twenty (20) hours per week.

While on probation, respondent shall not work for a registry or in any private duty position, except as approved, in writing, by the board. Respondent shall work only on a regularly assigned, identified and pre-determined work sites(s) and shall not work in a float capacity except as approved, in writing, by the board.

8. Supervision Requirements - Respondent shall obtain prior approval from the board, before commencing any employment, regarding the level of supervision provided to respondent while employed as an occupational therapist or occupational therapy assistant.

Respondent shall not function as a supervisor during the period of probation except as approved, in writing, by the board.

9. Continuing Education Requirements - Continuing education shall be completed within a period of time designated by the board, which timeframe shall be incorporated as a condition of this probation.

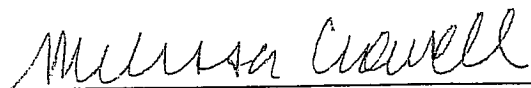
Continuing education shall be in addition to the professional development activities required for license renewal. The board shall notify Respondent of the course content and number of contact hours required. Within thirty (30) days of the board's written notification of the assigned coursework, respondent shall submit a written plan to comply with this requirement. The board shall approve such plan prior to enrollment in any course of study.

Failure to satisfactorily complete the required continuing education as scheduled, or failure to complete same no later than one-hundred (100) days prior to the termination of probation, shall constitute a violation of probation. Respondent is responsible for all costs of such continuing education. Upon successful completion of the course(s), respondent shall cause the instructor to furnish proof to the board within thirty (30) days of course completion.

10. Maintenance of Valid License - Respondent shall, at all times while on probation, maintain an active current license with the board, including any period during which license suspension or probation is tolled.
11. Cost Recovery - Within ninety (90) days of the effective date of this Decision, respondent shall reimburse the board the sum of \$1,367.50 for its costs of investigation and prosecution. Failure to reimburse the board its costs of investigation and prosecution shall be considered a violation of probation unless the board agrees in writing to payment by an installment plan because of financial hardship.
12. Chemical Dependency Support/Recovery Groups - Within five (5) days of the effective date of this Decision, respondent shall begin attendance at a chemical dependency support group (e.g., Alcoholics Anonymous, Narcotics Anonymous, or other similar group). Verified documentation of attendance shall be submitted by respondent with each quarterly report. Respondent shall continue attendance in such a group for the duration of probation.

13. Abstain From Controlled Substances - Respondent shall completely abstain from the personal use or possession of controlled substances, as defined in the California Uniform Controlled Substances Act, and dangerous drugs as defined in sections 4021 and 4022 of the Business and Professions Code, except when lawfully prescribed by a licensed practitioner for a bona fide illness.
14. Abstain From Use of Alcohol - Respondent shall completely abstain from the use of alcoholic beverages during the period of probation.
15. Submit Biological Fluid Samples - Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon request by the board or its designee. There will be no confidentiality in test results; positive test results will be immediately reported to the board and respondent's current employer.
16. Violation of Probation - If respondent violates probation in any respect, the board, after giving respondent notice and opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If an accusation or a petition to revoke probation is filed against respondent during probation, the board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.
17. Completion of Probation - Upon successful completion of probation, respondent's license will be fully restored.

DATED: September 9, 2010



MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings